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No. 09-220

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

THOMAS WARREN WHISENHANT,

Petitioner,

v.

RICHARD ALLEN, *Commissioner of the Alabama Department of Corrections*,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

(Rephrased)

Should this Court grant certiorari to review whether the Court of Appeals correctly determined that the Alabama courts' denial of Whisenhant's claim of judicial bias did not violate 28 U.S.C. § 2254(d) where Whisenhant's sole claim is that he was entitled to relief based on the probability of actual bias?

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OPINIONS BELOW

The United States District Court for the Southern District of Alabama issued an order denying all habeas relief. (Pet. App. 28-165) The United States Court of Appeals for the Eleventh Circuit affirmed. Whisenhant v. Allen, 556 F.3d 1198 (11th. Cir. 2009); (Pet. App. 1-27) Whisenhant's petition for rehearing and his petition for rehearing en banc were denied. (Pet. App. 166-167)

JURISDICTION

The Respondent does not dispute Whisenhant's statement of jurisdiction. (Pet. 1-2)

CONSTITUTIONAL PROVISIONS INVOLVED

Whisenhant accurately identifies and sets forth the text of the Fourteenth Amendment to the United States Constitution, but that amendment was not violated in this case.

STATEMENT OF THE CASE

Petitioner Thomas Whisenhant attempts to stretch the Court's freshly-minted "probability of actual bias" recusal standard to the limits. Caperton v. A.T. Massey Coal Co., Inc., 129 S.Ct. 2252, 2263 (2009). Whisenhant argues that the Alabama state courts wrongly failed to find a probability that his trial judge was biased based solely on the judge issuing an order *granting* Whisenhant's motion for expert funding—an order that was drafted by the prosecution. This claim is unworthy of certiorari review for two reasons. First, Caperton certainly does not stretch that far. Second, and perhaps more clearly, Whisenhant's claim arises from the denial of federal habeas relief under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). See 28 U.S.C. § 2254. Even if Capterton reached the facts of this case (and it does not), Caperton was not "clearly established" law at the time the state court decision. See 28 U.S.C. § 2254(d) (1). Thus, habeas relief is clearly foreclosed.

A. Facts Concerning The Crime

On the night of October 16, 1976, Cheryl Lynn Payton was working alone at a convenience store in Theodore, Alabama. Vol. 24, R. 182-191. Sometime before 10:00 p.m. that night, Whisenhant entered the convenience store with a gun and forced Mrs. Payton to walk out of the store and get into his pickup truck. Vol. 25, R. 77-80. Whisenhant drove Mrs. Payton to a remote area where he raped her in the front seat of the truck, then led her into the woods at gunpoint and shot her once in the head, killing her. Vol. 25, R. 45, 61, 81-82.

The following day, Whisenhant returned to the location of Payton's body, but left when he was accosted by some boys. Vol. 24, R. 201-06, Vol. 25, R. 77-80. The next day, Whisenhant returned to the location of the body and moved it approximately 60 feet so that it would more likely be found. Vol. 25, R. 77-80. On one or both of these occasions, Whisenhant mutilated Payton's body, using a knife to cut the left breast and abdomen, as well as the vaginal area. Vol. 25, R. 32, 46-47, 55, 64-65, 80, 85.

On the second occasion when Whisenhant returned to Payton's body, he was seen by a local farmer who also alerted the police that he had discovered a body. Vol. 24, R. 222, 225-27, Vol. 25, R. 244. Still in the area when the police arrived on the scene, Whisenhant tried to escape in his pickup truck, but was apprehended after a high-speed chase. Vol. 25, R. 245-256. Whisenhant eventually abandoned his truck and retreated into the woods. Vol. 25, R. 251. While hiding there, his wife was brought to the scene to communicate with him by a police loudspeaker. Vol. 25, R. 254. Upon hearing her voice, Whisenhant yelled, "I've done everything they said I did," and indicated that rather than surrender the police would have to kill him. Vol. 25, R. 254-55.

After being taken into custody, Whisenhant confessed to the rape, murder, and mutilation of Payton. Vol. 25, R. 24-91. He admitted that if someone had walked into the store during the course of the crime he would have left. Vol. 25, R. 90. He also confessed to murdering two other female convenience store clerks - one of whom he admitted to mutilating in the same fashion as he did Payton – in the preceding 12 months. Vol. 25, R. 24-91.

B. State Court Proceedings

Whisenhant was originally convicted and sentenced to death in 1977 for the rape/murder of Cheryl Payton. Vol. 9 at 1745-49. However, his conviction was reversed because the prosecutor engaged in improper closing argument by suggesting that Whisenhant would be released from custody if he were found not guilty by reason of insanity and because of a fatal variance between the indictment and the judgment. Whisenhant v. State, 370 So. 2d 1080, 1097-1102 (Ala. Crim. App. 1979).

In 1981, Whisenhant was tried and again convicted and sentenced to death. Vol. 12 at 103-07. This second conviction was affirmed by the Alabama Court of Criminal Appeals, but the sentence was reversed due to an improper remark during the prosecutor's penalty phase opening statement. Whisenhant v. State, 482 So. 2d 1225, 1239-40 (Ala. Crim. App. 1982). After cross petitions for certiorari were granted, the Alabama Supreme Court remanded the case for a determination of whether the penalty phase error was harmless. Ex parte Whisenhant, 482 So. 2d 1241 (Ala. 1983). On remand, the Court of Criminal Appeals held that the error was harmless and affirmed the death sentence. Whisenhant v. State, 482 So. 2d 1246 (Ala. Crim. App. 1983) The Alabama Supreme Court, however, determined that the error was not harmless and remanded for a new penalty phase trial. Ex parte Whisenhant, 482 So. 2d 1247 (Ala. 1984).

After remand, in 1987, Whisenhant received another penalty phase trial, and after a jury recommendation of death the trial judge sentenced Whisenhant to death. Vol. 19 at 168-76. The Court

of Criminal Appeals and the Alabama Supreme Court affirmed the death sentence. Whisenhant v. State, 555 So. 2d 219 (Ala. Crim. App. 1988), aff'd, Ex parte Whisenhant, 555 So. 2d 235 (Ala. 1989). The United States Supreme Court denied certiorari. Whisenhant v. Alabama, 496 U.S. 943 (1990).

Whisenhant then commenced post-conviction proceedings in state court by filing a Rule 32 petition. Vol. 35 at 31-52. In one of his claims, Whisenhant alleged that "the trial judge's bias and appearance of partiality at the time of the 1987 penalty phase hearing violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution..." After an evidentiary hearing, the Rule 32 trial court denied the petition. Vol. 37, R. 403-89. The Alabama Court of Criminal Appeals entered an unpublished memorandum opinion affirming the denial of the Rule 32 petition. Vol. 42, R-44. Specifically rejecting Whisenhant's claim of judicial bias on the merits, that court held that Whisenhant failed to offer any evidence of personal bias or partiality on the part of the trial judge. The Alabama Supreme Court denied certiorari. Vol. 43, R-49.

C. Facts Relating to Whisenhant's Claim That The Trial Judge Was Biased.

The facts underlying this claim relate to a motion filed before the 1987 penalty phase requesting funds to hire a psychiatrist. Vol. 19, 33-38. Prior to trial, defense counsel filed numerous motions with Judge Ferrill McRae[1] including a motion for access to a psychiatrist. Vol. 19, at 33-38. The motion is

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[1] Judge McRae presided over all three of Whisenhant's trials.

virtually identical to the motion for funds defense counsel filed before the 1981 trial. The motion mentioned the two psychiatrists that had performed an evaluation before the 1977 trial, Dr. Claude Brown and Dr. Emanuel Tanay. Id. The motion requested $2,200 for Dr. Brown and $2,000 for Dr. Tanay. Id. Specifically, the motion requested funds to hire Dr. Brown and Dr. Tanay for the following reasons: (1) to present evidence to establish that Whisenhant was insane when he committed the crime, (2) to establish the relevant statutory mitigating circumstances, and (3) to assist defense counsel in cross-examining the State's more numerous mental health experts. Id.

Judge McRae, although granting Whisenhant's motion in part, stated that Whisenhant was not "entitled" to have the motion granted. Vol. 19 at 39-40. In that regard, the order stated:

> Defendant presented abundant psychiatric evidence at the first trial and the same evidence was available to him at the second trial and is still available to him. Had he desired to do so, Defendant could have read the psychiatric testimony from the first trial into the record before the jury at the second trial, and he could also do so now. The Defendant also could have subpoenaed at least one of his expert psychiatric witnesses to present live testimony at his second trial, and he can do so now. Dr. Claude Brown was a member of the Lunacy Commission, he testified on behalf of the Defendant at the first trial, and he was within the

> jurisdiction of the Court at the time of the second trial, and he still is. Dr. Brown has previously testified that he would obey a subpoena to testify again in this case.

Id. The order also noted that the Southern Poverty Law Center, Whisenhant's counsel, could easily provide the funds to provide psychiatric assistance at trial and that the failure to do so must be a "litigation tactic." Id. Nevertheless, the order granted up to $2,200, plus "reasonable expenses" "to hire an independent psychiatric expert to assist the Defendant in any way he and his counsel see fit." Id. at 40. The order noted however that if Dr. Brown was not retained, "the Court will enforce a subpoena to Dr. Brown and will see that he attends trial and testifies, since he was a member of the Lunacy Commission and is within the jurisdiction of the Court, if Defendant and his counsel desire that he do so." Id.

As a part of the Rule 32 proceedings, Whisenhant presented documents tending to show that District Attorney Chris Galanos, one of the prosecutors at the 1987 penalty phase trial, gave Judge McRae a draft order concerning the motion for funds to hire a psychiatrist. Vol. 36, at 314. Attached to the order was a handwritten note from Galanos that stated, among other things, that the order granting funds to hire a psychiatrist "enumerates facts intended to preclude Ake error during the guilt [sic] stage." Vol. 36, at 314. The handwritten note further stated "[l]et me know what you want to do." Vol. 36, at 314. The handwritten note is dated "2/4," presumably the day before the order granting funds to hire a psychiatrist was entered on February 5, 1987. Vol.

19, at 39-41. Galanos testified at the Rule 32 evidentiary hearing that he did not serve the draft order on counsel for Whisenhant.[2] Vol. 37 at 58. The draft order (that contains Galanos's handwritten revisions) and the order entered by Judge McRae are substantially the same. Judge McRae's order changed the format of the draft order, corrected a mistake caused by one of the revisions, and changed the amount of "$2,000" that was stated in the draft order to "$2,200."

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[2] For reasons unknown, Whisenhant's brief elevates the role of then-Assistant Attorney General (now Eleventh Circuit judge) Ed Carnes in the purported "clandestine scheme." The undisputed evidence demonstrates that District Attorney Galanos hand delivered the draft order to Judge McRae. Vol. 37 at 57-58. In addition, Whisenhant's brief (on more than one occasion) labels Judge Carnes as "lead counsel" at the 1987 penalty phase trial. However, the record of that trial reflects that Judge Carnes did not handle any witnesses nor did he make an opening statement or closing argument.

REASONS WHY THE PETITION SHOULD BE DENIED

The gist of Whisenhant's petition to this Court consists of this: he asks this Court to apply a standard that does not apply to his case. Whisenhant's sole claim of error is that the Court of Appeals should have considered whether the "probability of actual bias" on the part of Judge McRae violated due process.[3] However, as Whisenhant fails to acknowledge, this Court has only applied this objective standard in three limited instances: 1) when a mayor-judge benefited financially from a defendant's conviction; 2) when a judge was the object of a defendant's contempt; and,

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[3] In his petition to this Court, Whisenhant does not allege that Judge McRae was actually biased against him, although this claim was raised in the courts below. Therefore, the issue of whether Judge McRae was actually biased is not properly before this Court. Regardless, this claim was rejected by the state court and by the District Court below on habeas review. The Alabama Court of Criminal Appeals, in denying Whisenhant's claim of actual bias, held that Whisenhant "failed to offer any evidence of personal bias or partiality on the part of Judge McRae" and that "the order entered by Judge McRae granted [Whisenhant] all of the funds he had sought." The Federal District Court below held that it "cannot conclude that Judge McRae was actually biased or prejudiced against Whisenhant." (App. 124-25) That court went on to conclude that the fact that Judge McRae "apparently signed the State's proposed order granting a defense motion without input from the defense on the form of that order simply does not evince the kind of bias or prejudice that rises to the level of a constitutional violation" and therefore, held that "the Alabama courts' denial of Whisenhant's judicial bias claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law as determined by the Supreme Court." (App.125-26)

as determined recently by this Court 3) when a person with an interest in a case provided extreme campaign contributions to the particular judge hearing that case.

The facts of Whisenhant's case do not fall within those categories. Accordingly, the Court of Appeals correctly determined that Whisenhant's case was not analogous to the situations noted above and that, therefore, Whisenhant was not entitled to relief under 28 U.S.C. § 2254.

I. THE STATE COURTS' DENIAL OF WHISENHANT'S CLAIM THAT THE STATE TRIAL JUDGE WAS BIASED AND IMPARTIAL WAS NOT CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED FEDERAL LAW.

This case is not worthy of certiorari review because the Eleventh Circuit Court of Appeals correctly determined that the Alabama courts' denial of Whisenhant's judicial bias claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law as determined by this Court. The Court of Appeals rejected Whisenhant's claim that Judge McRae's order during the 1987 penalty phase retrial created an "appearance of partiality" which violated his due process rights because that court found that there was no decision from this Court clearly establishing that the "appearance of bias or partiality" alone, absent actual bias, violated the Due Process Clause. Whisenhant v. Allen, 556 F.3d 1198, 1209 (11th. Cir. 2009). The Court of Appeals further rejected Whisenhant's claim that the "probability of actual bias" on the part of Judge McRae denied him due

process, noting that this Court had only identified certain situations in which the probability of actual bias became "constitutionally intolerable", namely, cases "in which the judge has a pecuniary interest in the outcome or has been personally abused or criticized by the party before him." Id. That court held that these judicial bias cases were not analogous to the facts of Whisenhant's case and that, therefore, the Alabama courts' denial of Whisenhant's claim was not contrary to, or an unreasonable application of, clearly established federal law. Id. at 1210.

In an effort to gain certiorari review in this Court, Whisenhant mischaracterizes the Court of Appeals' holding and further, ignores critical distinctions in this Court's precedent. Whisenhant claims that the Court of Appeals failed to apply the correct "objective standard" to determine when recusal is required and instead required Whisenhant to "establish actual judicial bias by showing that 'the judge has a pecuniary interest in the outcome of the case or has been personally abused or criticized by the party before him.'" Whisenhant's petition at p. 10. Whisenhant, citing Tumey v. Ohio, 173 U.S. 510 (1927), In re Murchison, 349 U.S. 133 (1955), and this Court's recent decision in Caperton v. A.T. Massey Coal Co., 129 S.Ct. 2252 (2009), argues that the Court of Appeals should have considered whether the facts involving Judge McRae led to a potential or probability for actual bias. Whisenhant's petition at pp. 11-12.

Whisenhant's assertion is flawed. No error occurred in this case. The Court of Appeals properly determined that the "probability of actual bias" standard did not apply to Whisenhant. That court

correctly concluded that, based on the facts of his case, Whisenhant's claim of judicial bias did not fall within the limited category of cases in which this Court has held that the probability of actual bias resulted in a violation of due process.

Whisenhant's problem is that his case simply does not fall into those limited categories. Notably, in his petition to this Court, Whisenhant ignores the specific circumstances in which this Court has held that the "probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." Withrow v. Larkin, 421 U.S. 35, 47 (1975). Further, Whisenhant makes no real attempt in his petition to articulate how the facts of his case align with the particular categories in which this Court has required recusal on due process grounds based on the "probability of actual bias." More importantly, there is no Supreme Court precedent on point to the situation presented by this case. Accordingly, the Court of Appeals correctly determined "that the Alabama courts' denial of Whisenhant's judicial bias claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law as determined by the Supreme Court." Whisenhant, 556 F.3d at 1210.

A. The Legal Principles Announced In Tumey and Murchison Are Inapplicable To This Case.

Whisenhant contends that the state court applied a rule that contradicted the rule espoused in Tumey v. Ohio, 273 U.S. 510 (1927) and In re Murchison, 349 U.S. 133 (1955) and that the Court of Appeals likewise failed to apply this rule in reviewing the

state court decision. However, a federal court's review of a state court adjudication is limited to whether the state court decision was contrary to or an unreasonable application of the clearly established precedent of this Court. Williams v. Taylor, 529 U.S. 362, 412-413 (2000). Although not explicitly stated in his petition, Whisenhant apparently contends that it is "clearly established" that under the facts of his case – where a hand-delivered draft order, granting Whisenhant's motion for funds was not served on the defense – Judge McRae's recusal was required under the Due Process Clause based on "a probability of actual bias." Contrary to the view espoused by Whisenhant, this rule is far from clearly established; in fact, this Court has not established such a rule at all.

"A fair trial in a fair tribunal is a basic requirement of due process." Murchison, 349 U.S. at 136. The general guiding principle is that the "Due Process Clause clearly requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of his particular case." Bracy v. Gramley, 520 U.S. 899, 117 S.Ct. 1793 (1997). However, this Court has cautioned that "[a]ll questions of judicial qualification may not involve constitutional validity." Tumey, 273 U.S. at 523. In fact, "most questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard." Bracy, 520 U.S. at 904.

This Court has traditionally required judicial recusal based on a probability of actual bias in only two specific instances, neither of which apply to

Whisenhant's case: 1) when a judge benefits financially from the outcome of a case and 2) when a judge was the object of a defendant's contempt. See Caperton, 129 S.Ct. at 2262. Tumey represents the first instance, in which a judge has a financial interest in the outcome of a case that leads to a constitutionally impermissible probability of actual bias. In Tumey, the defendant was arrested on charges of unlawfully possessing intoxicating liquors and was brought before the mayor of the village of North College Hill. 273 U.S. at 514. Under Ohio law, the mayor had authority to try cases involving the possession of alcoholic beverages. Additionally, state law provided that the mayor would receive fees for serving as a judge and for trying such cases; however, the mayor would only be paid fees if he convicted the defendants who appeared before him. Id. at 520. This Court then held that a defendant's due process rights were violated and that disqualification is required where, as in the facts presented in Tumey, a mayor/judge had a direct, personal, substantial pecuniary interest in reaching a conclusion against the defendant in that case. Id. at 523, 535.

Murchison exemplifies the second instance where a judge acted as a "one-man grand jury" and, through his prior relationship with the defendant, therefore, was the object of the defendant's contempt. In In re Murchison, 349 U.S. 133 (1955), this Court was called upon to address the constitutionality of a Michigan law that allowed the same judge who served as a "one-man grand jury" before which certain witnesses had testified to also preside over the contempt hearing where the same witness/defendants were found guilty of perjury. In

addition to his role of being a one-man grand jury and petit jury, the trial judge made a comment that he would personally investigate whether an apparent alibi offered by the defendant was untruthful. Id. at 137. The Murchison Court found that "[f]air trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." Id. Accordingly, this Court ruled that "it was a violation of due process for the 'judge-grand jury' to try these petitioners, and it was therefore error for the Supreme Court of Michigan to uphold the convictions." Id. at 140.

Tumey and Murchison are off point as "clearly established precedent" in Whisenhant's case. They stand merely for the principles that a trial judge should be disqualified (1) when the judge has a pecuniary interest in the outcome of the case or (2) where state procedure allows for the trial judge to serve also as the grand jury and prosecutor, resulting in the judge becoming an object of the defendant's contempt. Put simply, the principles announced in Tumey and Murchison are not applicable – let alone "clearly" applicable – to this case. In the present case, after Whisenhant filed a motion before the 1987 penalty phase trial that requested funds to hire two hand-picked psychiatrists, Mobile County District Chris Galanos hand delivered a draft order to Judge McRae without serving a copy on defense counsel. However, Judge McRae's eventual order, although similar to the draft order which Galanos hand delivered to Judge McRae, granted Whisenhant's request for funds to hire mental health experts. The legal principles stated in Tumey and Murchison have no application because Judge McRae did not have anything like a pecuniary interest in the outcome of

the case and Judge McRae did not serve as a one-man grand jury or investigate the crime resulting in the defendant's contempt.

The Court of Appeals correctly identified these two limited instances in which this Court has held that recusal was required under the Due Process Clause based on a probability of actual bias on the part of a judge and correctly determined that Whisenhant's case did not fall within those categories. Specifically, that court held that "[i]t is clear that the judicial bias cases cited by Whisenhant involve totally different facts from his own case." Whisenhant, 556 F.3d at 1210. That court found that Whisenhant's case was neither analogous to Murchison, nor comparable to other decisions relied on by Whisenhant which involved criminal contempt proceedings in which the judge was "the one reviled by a contemnor." Id. at 1209-10. However, as the Court of Appeals determined, Whisenhant's case was "totally different": there was no evidence that Judge McRae was involved in a "running controversy" with Whisenhant, no personal attacks were made by any party, Judge McRae never displayed a hostile attitude towards Whisenhant, and most importantly, Judge McRae's order granting Whisenhant's motion for funds benefitted the defense. Id.

The standard which Whisenhant espouses for reviewing his claim of judicial bias simply does not apply to his case. Whisenhant ignores the clear cut factual scenarios in which this Court has reviewed whether the "probability of actual bias" warrants recusal because plainly, his case does not fall into such limited instances. Attempting to support his contention that the Court of Appeals wrongly held that "the potential for actual bias" standard has only

been applied in limited instances by this Court, Whisenhant cites a list of cases in which he claims this Court has identified "numerous factual circumstances where the potential for judicial bias was too great to be constitutionally tolerable." Whisenhant's petition at p. 13. However, Whisenhant's analysis of this Court's decisions regarding judicial bias misses the mark.

The cases cited by Whisenhant in his petition do not support his argument, but instead, support the complete opposite conclusion, which was reached by the Court of Appeals. All of the cases cited by Whisenhant fall neatly within the two limited instances in which this Court has held that recusal is required under the Due Process Clause based on a "probability of actual bias": 1) when a judge benefits financially from the outcome of a case and 2) when a judge was the object of a defendant's contempt. See Tumey v. Ohio, 273 U.S. 510 (1927) (judge benefited financially from outcome of case); Offutt v. United States, 348 U.S. 11 (1954) (judge was object of defendant's contempt); In re Murchison, 349 U.S. 133 (1955) (judge was object of defendant's contempt); Mayberry v. Pennsylvania, 400 U.S. 455 (1971) (judge was object of defendant's contempt); Ward v. Village of Monroeville, 409 U.S. 57 (1972) (judge benefited financially from outcome of case); Aetna Life Ins. Co v. Lavoie, 475 U.S. 813 (1986) (judge benefited financially from outcome of case). Whisenhant's petition at pp. 13-14. The facts of Whisenhant's case do not compare with the facts of those cases in which this Court has found that the probability of actual bias warrants recusal.

Tumey, Murchison, and their progeny have no application in deciding whether the Alabama courts'

decision was contrary to clearly established Supreme Court precedent. Whisenhant has not cited a decision from this Court that discusses the situation where a trial judge receives a draft order from the prosecutor that is not served on defense counsel but grants the relevant motion filed by defense counsel. Thus, the state court decision is not contrary to, nor an unreasonable application of, clearly established federal law as determined by this Court.

B. The Legal Principles Recently Announced By This Court in Caperton Are Also Inapplicable to Whisenhant's Case.

This Court's recent decision in Caperton does not provide any support to Whisenhant's claim that the Alabama courts' denial of his judicial bias claim was contrary to, or involved an unreasonable application of, clearly established federal law; nor does the Court of Appeals' holding below conflict with Caperton. The legal principles announced in Caperton are off point and the extreme facts of Caperton are not present in Whisenhant's case.

Claiming that the Court of Appeals' holding is in "direct conflict" with this Court's precedent, Whisenhant contends that the Court of Appeals failed to follow the rule reaffirmed in Caperton that "the Due Process Clause has been implemented by objective standards that do not require proof of actual bias." 129 S.Ct. at 2263; Whisenhant's petition at p. 11. However, Whisenhant fundamentally misconstrues this Court's holding in Caperton. Contrary to Whisenhant's suggestion, this Court did not announce a rule that all claims of judicial bias raised under the Due Process Clause do not require

proof of actual bias. Instead, this Court acknowledged in Caperton that the objective standard of inquiring into the probability of actual bias in judicial bias cases had only been applied in two instances: 1) when a mayor-judge benefited financially from a defendant's conviction and 2) when a judge was the object of a defendant's contempt. See Caperton, 129 S.Ct. at 2259-2262. This Court simply extended this objective standard in a limited fashion to claims of judicial bias in which a person with an interest in a case provided extensive campaign contributions to the particular judge hearing that case.

Specifically, this Court concluded that "there is a serious risk of actual bias-based on objective and reasonable perceptions-when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." Id. at 2263-2264. This Court further noted that even among judicial bias cases involving campaign contributions and election, that the facts of Caperton were extreme and that "[a]pplication of the constitutional standard implicated in this case will thus be confined to rare instances." Id. at 2265, 2267.

Accordingly, Caperton is off-point as "clearly established precedent" in the context of Whisenhant's case. The facts which comprise Whisenhant's claim of judicial bias regarding Judge McRae have nothing to do with raising campaign funds or directing Judge McRae's election campaign. Moreover, nothing in Caperton requires a state court under the Due Process Clause to consider a judge's "probability of actual bias" in a factual situation

where a judge receives a proposed order – benefiting the defendant – that was not served on the defense.

Even if Caperton could be stretched beyond its holding to apply to this specific factual situation – although it does not apply – Whisenhant would still not be entitled to habeas relief because the state courts' decision must be viewed through the deferential lens of AEDPA. See 28 U.S.C. § 2254. At the time of the state court Rule 32 proceedings, Caperton had not been decided and thus, the legal principles announced in Caperton were not "clearly established" for purposes of reviewing the state courts' decision. See 28 U.S.C. § 2254(d) (1). In any event, this Court need not go that far in its review because the legal principles announced in Caperton simply do not apply to the facts of Whisenhant's claim.

Therefore, the Court of Appeals' determination that Whisenhant's case did not fall within the limited instances in which this Court has held that the "probability of actual bias" on the part of a judge requires recusal under the Due Process Clause is correct, even in light of Caperton. More important to the immediate question before this Court, the Alabama courts' denial of Whisenhant's judicial bias claim was neither contrary to, nor involved an unreasonable application of clearly established law as determined by this Court. 28 U.S.C. § 2254(d).

CONCLUSION

The Court should deny Whisenhant's petition for writ of certiorari.

Respectfully submitted,

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